97CV04628-EHN-MDG

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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SHAWN ANDERSON,

97 CV 4628

Petitioner,

- against -

MEMORANDUM
AND
ORDER

HANS WALKER, Superintendent, Auburn Correctional Facility, and DENNIS VACCO, Attorney General, New York State.

Respondent.

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THE LEGAL AID SOCIETY
(Elon Harpaz, Richard Joselson, of counsel)
90 Church Street
New York, NY 10007
for petitioner.

CHARLES J. HYNES
District Attorney, Kings County
(Anne C. Feigus, of counsel)
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210 Joralemon Street
Brooklyn, New York 11201

NICKERSON, District Judge:

On August 11, 1997, petitioner, by his attorney, brought this proceeding for a writ of habeas corpus

challenging his conviction pursuant to 28 U.S.C. § 2254.

On March 6, 1992, during the course of a robbery, petitioner shot and killed Steven Murray. Petitioner was convicted in New York Supreme Court, Kings County, of felony murder, first-degree manslaughter as a lesser-included offense of intentional murder, and two counts of first-degree robbery. On April 14, 1993 he was sentenced to a term of imprisonment of twenty-five years to life on the murder count and to concurrent terms of imprisonment of eight and one-third to twenty-five years on each of the remaining counts.

On July 8, 1994, petitioner moved to vacate the judgment of conviction pursuant to New York Criminal Procedure Law § 440.10 on the ground that his trial counsel was ineffective, and that the prosecution failed to disclose certain Rosario materials at trial. The hearing court denied the motion on November 22, 1994, and again on rehearing. On March 22, 1995, the Appellate Division, Second Department, denied

petitioner's application for leave to appeal that decision.

Petitioner then appealed his judgment of conviction to the Appellate Division, Second Department, claiming, among other things, that he was deprived of his constitutional right to counsel of his choice. On January 8, 1996, the Appellate Division affirmed the conviction. People v. Anderson, 636 N.Y.S.2d 394 (2d Dep't 1996).

By letters dated February 22, 1996 and March 25, 1996, petitioner sought leave to appeal to the New York Court of Appeals. That request was denied on August 20, 1996. People v. Anderson, 88 N.Y.2d 980, 649 N.Y.S.2d 386 (1996).

Petitioner's application for a writ of habeas corpus was filed with this Court on August 11, 1997.

I

Petitioner presents a single claim in this petition for habeas corpus: that he was deprived of his Sixth Amendment right to counsel of his choice.

Lee Kimmel was assigned to represent petitioner at trial. At the outset of jury selection on March 11, 1992, Mr. Kimmel noted his appearance on petitioner's behalf, and proceeded to conduct the voir dire examination and exercise challenges for cause.

Hubert Marshall, an attorney and friend of the petitioner's family, was seated at the defense table at the petitioner's request. During the exercise of peremptory challenges, Mr. Marshall asked if he could participate in the discussion. The court replied:

> We are going to have a little problem, I think. I will permit you in this context, Mr. Marshall, to contribute. I know you did consult with your client and Mr. Kimmel about this. But there is going to have to be one lawyer speaking for the defendant here.

After the jurors were excused for lunch, the court inquired into whether Mr. Marshall had been admitted to practice in New York. The court admonished Mr. Marshall not to speak in front of the jury, and continued, "I didn't expect you to be seated at that [defense] table."

Upon returning from the lunch break, Mr. Kimmel informed the court that "Mr. Marshall will handle the voir dire." The following colloquy ensued:

> THE COURT: Well, Mr. Kimmel, this is kind of unusual. You are the attorney of record, and I didn't object to Mr. Marshall second seating. But he is not in this case as far as I am concerned. He is sitting there with you. But this is inappropriate. I can't see a basis to have him now take over the defense of this case. There has been no such application. . . . I am not going to at this point substitute counsel.
>
> MR. KIMMEL: It is not going to be substitution. I will be here. He is co-counsel. He would like to conduct, you know, the trial. I will be here.
>
> THE COURT: No, Mr. Kimmel, I will not permit that at this point. This case was started without Mr. Marshall being present. I am permitting him to sit at the counsel table. And I will introduce him as a participant in the defense with Mr. Anderson. But I expect you to proceed as counsel. . . .
>
> I do want the record to be very clear about this. Until this very moment I did not have any reason to believe that Mr. Kimmel was not the only attorney representing this defendant. And when you appeared this morning, Mr. Marshall, I was quite willing, based on your membership in the bar of the state of New York, [and the fact that] you are evidently a personal friend or related in some way to the defendant, to have you sit at the counsel table. I intend to introduce you to the panel. You and Mr. Kimmel can confer all you want amongst yourselves. But I have to have one lawyer

> who is responsible for objecting. One lawyer responsible for taking a legal position. And Mr. Kimmel has been appointed not by myself, but by another judge, to be your, this defendant's attorney of record. And I rely upon him to be the one who says whatever has to be said on behalf of your client. . . .
>
> I am not precluding you. But Mr. Kimmel is the only one authorized to actually speak out in court on behalf of the defendant. I will not permit a second attorney to take over any aspect of that, because I think it risks possible inconsistencies. . . .
>
> Mr. Kimmel has always been the one who appeared in the case. He is the one who knows the case. And I think it would not be appropriate at this point to add a voice that is coming into it at the last minute.

After the jury returned from lunch, the court introduced Mr. Marshall, stating, "He is going to assist in the defense of Mr. Anderson together with Mr. Kimmel."

During the course of the trial, Mr. Marshall participated actively in arguments that arose about legal issues. At the close of trial, petitioner requested that Mr. Marshall be permitted to sum up on his behalf. The court granted the request, with the following caveat:

> Now, Mr. Anderson, I understand that Mr. Marshall is a friend, and he has been here many times and he's been supportive of you and participated in this case, but Mr. Kimmel is the attorney of record. He came into the case early on. He's been here through everything that's occurred up to now. And normally, he's the one that would do the summation. Now, I don't have an objection to having Mr. Marshall do the summation, but it's important that you understand what this decision means to you.

While the record reflects that Mr. Kimmel on behalf of petitioner requested that Mr. Marshall serve as lead co-counsel, at no time during the trial did the petitioner, Mr. Marshall, or Mr. Kimmel move to have Mr. Marshall substituted as counsel in place of Mr. Kimmel.

II

The Antiterrorism and Effective Death Penalty Act (the Act), Pub. L. No. 104-132, 110 Stat. 1214, 1220 (1996), provides that a state prisoner's application for a writ of habeas corpus shall not be granted with respect to any claim that was adjudicated on the merits in state court proceedings unless that adjudication (1) "resulted in a decision that was contrary to, or

involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or (2) was "based on an unreasonable determination of the facts in light of the evidence presented at the State Court proceeding." 28 U.S.C. § 2254(d)(1). Findings of fact by the state court are presumed to be correct, and the petitioner bears the burden of rebutting this presumption by "clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

The Sixth Amendment guarantees a criminal defendant the right to counsel. See Wheat v. U.S., 486 U.S. 153, 158, 108 S. Ct. 1692, 1696 (1988). But the Supreme Court has cautioned that the right is not unfettered:

> [T]he essential aim of the Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers.

Id. at 158. When a defendant requests that counsel be added or substituted, his preference must be weighed

against the court's independent interest in ensuring that a criminal trial is fair and just. Id. at 160. "Certain restraints must be put on the reassignment of counsel, lest the right be manipulated so as to obstruct the orderly procedure in the courts or to interfere with the fair administration of justice." McKee v. Harris, 649 F.2d 927, 931 (2d Cir. 1981).

Mr. Kimmel, on behalf of petitioner, waited until jury selection was in progress before requesting that Mr. Marshall serve as petitioner's attorney, and petitioner himself did not voice a request to be represented by Mr. Marshall until summations. The trial court expressed two concerns about permitting Mr. Marshall to represent petitioner: first, that while Mr. Kimmel "is the one who knows the case," Mr. Marshall, "coming into it at the last minute," might not; and second, that permitting two attorneys to voice objections before the jury "risks possible inconsistencies."

By permitting Mr. Marshall to sit at the defense table and participate in legal arguments, the trial court granted Mr. Marshall the status of co-counsel. The proviso that Mr. Kimmel alone could act as defendant's spokesperson in the presence of the jury prevented the possibility of inconsistencies in the presentation of petitioner's case, but left Mr. Kimmel and Mr. Marshall free to "confer all you want amongst yourselves." Once Mr. Marshall showed the court that he was fully familiar with the case, and after petitioner himself requested that Mr. Marshall participate, the trial judge permitted him to present the summation on the petitioner's behalf. The State court was reasonable in its determination that the trial judge's actions appropriately balanced the defendant's constitutional rights and the public need for the orderly administration of justice.

The petition for a writ of habeas corpus is denied. A certificate of appealability will not be issued because petitioner has not made a substantial

showing of the denial of a constitutional right. 28 U.S.C. § 2253; see Reyes v. Keane, 90 F.3d 676, 680 (2d Cir. 1996).

So ordered.

Dated: Brooklyn, New York
August 6, 1998

Eugene H. Nickerson

Eugene H. Nickerson, U.S.D.J.